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Nº. 06-1036

Supreme Court, U.S.
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In The Supreme Court of the United States

RALPH TAYLOR,
Petitioner,
v.
CITY OF FALMOUTH AND DONALD ENGLAND,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. What is the proper standard for determining whether retaliatory verbal conduct toward an ordinary citizen engaged in First Amendment activity is actionable under §1983, is it either: (1) not actionable under any circumstances as a matter of law simply because it is verbal in nature (as held by the Sixth, Fifth and Ninth Circuits); (2) actionable only if it includes a threat, coercion or intimidation (as held by the Fourth Circuit); or (3) actionable where it would deter a reasonable person from engaging in protected activity (as held by the Second Circuit and as recently set forth by this Court in the employment context in Burlington)?

2. What is the proper evidentiary threshold for an ordinary citizen to establish a violation of the Equal Protection Clause where a government official subjects him to a racial slurs and harassment, is it either; (1) proof that the conduct had a discriminatory effect and a discriminatory purpose (as this Court held in *Arlington Heights*); or (2) proof of a racial slur plus harassment and/or a distinct violation of rights (as held by the Sixth, Third, Fifth and D.C. Circuits); and if the second standard applies, what is the standard for defining "harassment"?

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STATEMENT OF THE CASE

It is an undisputed matter of record that Petitioner Ralph Taylor, while speaking under official recognition during a city council meeting, was interrupted, was called a "big black bastard" and threatened with violence by Respondent Donald England, a city council member, simply because Mr. Taylor raised an issue that the city council did not want to address.[1]

Respondents' contention that there is no evidence in the record that the city council "*as a whole*" engaged in the retaliatory and racially hostile conduct at issue is simply incorrect. (Respondents' Brief at 9). The record is clear that England's racist and retaliatory comments were made during an official council meeting after Mr. Taylor had been officially recognized to address the council. Mr. Taylor testified that in the wake of England's statements, he heard laughter from other members of council. (R. Taylor Depo. Apx. 231). Every member of the city council admitted that they heard England's racial outburst, but not a single one of them did and said anything to counteract it. (England Depo. Apx. 246-247; Fields Depo. Apx. 250; Faugher Depo. Apx.

[1] Respondents' suggestion that Mr. Taylor's grievance, which related to the City's unlawful impoundment of his son's vehicle, was appropriately handled by the City on that evening was squarely rejected by the district court. Indeed, neither Mr. Taylor nor his son Shawn obtained *any* meaningful relief for the grievance until the district court entered summary judgment in *favor* of Shawn Taylor finding that the City's confiscation and retention of the vehicle violated his rights to due process of law. (Apx. D-68).

252-253; Sheilds Depo. Apx. 256; Cross Depo. Apx. 266). England's statements, coupled with every other member's admitted acquiescence, would permit a reasonable fact finder to infer that the entire council tacitly approved of and/or condoned England's statements and threats sufficient to establish the culpability of the legislative body. *Christie v. Iopa*, 176 F.3d 1231, 1240 (9th Cir. 1999); *Bartholomew v. Fischl*, 782 F.3d 1148, 1154 (3d Cir. 1986)("a 'single instance' of misconduct by a policy-making city official could provide the basis for an inference that a municipal policy existed.")

SUMMARY OF THE REPLY ARGUMENT

According to Respondents, it is "clearly understood" that a reasonable African American of ordinary firmness would not be deterred from speaking in front of an all-white city council at a public meeting "simply because [England], on one occasion, called [Mr. Taylor] a 'black bastard' and threatened to engage him in a fist fight." (Respondents' Brief at 21). In other words, a reasonable African American should expect to endure racial slurs and threats of violence from government officials if he wishes to exercise his First Amendment right to approach the podium during an open government meeting. Although this statement may seem absurd on its face, it is, at present, the state of the law in several circuits across the country, including the Sixth Circuit.

Respondents sidestep the central issues raised in Mr. Taylor's petition, failing to squarely address any the three arguments presented therein: (1) that a conflict exists among the circuits as to whether and when verbal conduct constitutes actionable retaliation § 1983; (2) that under *Burlington*, employees are given greater protection against retaliation for engaging in statutorily-protected activity than ordinary citizens are given for engaging in First Amendment activity; and (3) that the heightened "harassment" requirement for an equal protection claim imposed by circuit courts does not comport with the standards set by this Court in *Grutter* and *Arlington Heights* and lacks any consistent definition among the circuits.

In the absence of this Court's intervention, African Americans like Mr. Taylor who simply wish to speak out at a public meeting face a daunting choice: either put up with racial slurs and threats of violence from government officials or remain silent. Surely this cannot be the law of the United States. Unless this Court smoothes this legal landscape, however, it will be.

ARGUMENT

I. RESPONDENTS' OWN AUTHORITIES ILLUSTRATE THE THREE-WAY CONFLICT AMONG THE CIRCUIT COURTS ON WHETHER AND WHEN VERBAL CONDUCT CONSTITUTES ACTIONABLE RETALIATION.

Respondents attempt to characterize all circuits as in agreement on the standard for determining what constitutes actionable retaliation under the First Amendment is, at best, misleading. The "person of ordinary firmness" standard can hardly be considered a consistent guideline among the circuits where some, like the Sixth Circuit, categorically refuse to consider retaliatory verbal conduct – regardless of its content – as actionable. Indeed, Respondents incorrectly represent to this Court that the Sixth Circuit applied the "person of ordinary firmness" standard to the facts of this case. It did not. (*See* Respondents' Brief at 21). The Sixth Circuit circumvented that question by posing another question, specifically whether "*verbal abuse* is sufficient (or insufficient) evidence of adverse action." (Apx. C-11)(emphasis in original). Relying on *Bender v. Brumley*, 1 F.3d 271 (5th Cir. 1993) and *Doe v. Gooden*, 214 F.3d 952 (8th Cir. 2000), the Sixth Circuit determined that a claim for retaliation based on verbal conduct cannot support a § 1983 claim as a matter of law. (Apx. C-13).

Respondents' own authorities underscore the three differing views expressed by the circuit courts as to whether and when verbal conduct can constitute actionable retaliation under § 1983: (1) no/never (Sixth, Fifth and Eighth Circuits); (2) yes/if the verbal conduct contained a coercion or threat (Fourth Circuit); and (3) yes/if the verbal conduct would deter a reasonable person from engaging in First Amendment activity (Second Circuit applying this Court's decision in *Burlington* to § 1983 retaliation). In practical terms, this inconsistency means that had Mr. Taylor brought his same claims in a different judicial circuit, such as the Second or Fourth Circuits, his retaliation claim would not have been summarily rejected simply because the admitted retaliatory conduct he was forced to endure was verbal in nature. Contrary to Respondents' argument, resolving this type of disparity between the circuits on an issue of Constitutional significance is precisely the purpose of certiorari.

II. *BURLINGTON* REQUIRES COURTS TO CONSIDER THE CONTEXT AND DETERRENT EFFECT OF ALL RETALIATORY CONDUCT.

Respondent concedes that the scope of protection against retaliation in a § 1983 context should, at a minimum, be equal to the scope of the protection against retaliation in an employment context conferred by *Burlington*. What Respondent fails to address, however, is that while *Burlington*

does not render every retaliatory act actionable, it does require that courts consider every act in the specific context in which it was undertaken to determine whether the act "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington*, 126 S.Ct. at 2415 (internal citations omitted). Under *Burlington*, the form of the retaliatory conduct does not matter; all retaliatory acts must be judged on their substance. *Id.* Where circuit courts like the Sixth Circuit (as well as the Fourth, Fifth and Eighth Circuits) base their decisions on the form of the conduct, i.e., verbal, with no consideration of context or substance to determine whether the verbal conduct with have deterred a reasonable person from engaging in First Amendment activity, these circuits are applying a standard of protection less than that set forth in *Burlington*. *Id.*

The discrepancy between retaliation protections conferred by *Burlington* in the employment context and the undefined scope of protection in the First Amendment context is best illustrated by applying the egregious facts of this case to the employment context. Had Petitioner's been couched in an employment context and subject to *Burlington*, that is, had Petitioner filed an EEOC charge of discrimination and Donald England, acting as his employer, had responded to his protected activity by calling him a "big black bastard" and threatening to inflict physical harm upon him as result,

Petitioner would have an actionable claim for employment retaliation under Title VII. *See i.e., Thomas v. iStar Financial, Inc.*, 438 F.Supp.2d 348, 366 (holding that threats can be a materially adverse action under Title VII); *Walsh v. Irvin Stern's Costumes*, unreported, 2006 WL 2380379 at *2 (E.D.Pa 2006)(employer's threat to accuse plaintiff's of criminal offense if she did not withdraw EEOC charge actionable retaliation); *Wyatt v. Ford Motor Co.*, unreported, 2006 WL 2009230 at *5 (actionable retaliation where verbal intimidation escalated after protected activity). Yet in a First Amendment context, the Sixth Circuit summarily deemed those same facts not actionable by the Sixth Circuit simply because they were verbal in form. The result is that Petitioner received less protection from retaliation for engaging in First Amendment activity then he would if he were an employee engaged in Title VII activity.

III. THE HEIGHTENED AND UNDEFINED "HARASSMENT" REQUIREMENT IMPOSED BY SOME CIRCUIT COURTS CONFLICTS WITH THIS COURT'S REQUIREMENTS FOR AN EQUAL PROTECTION CLAIM.

This Court has never required an evidentiary burden of showing "harassment" in addition to evidence of racially discriminatory treatment in order to make out an equal protection claim. Respondent fails to address this Court's articulation of an equal protection claim in *Grutter v.*

Bollinger, 539 U.S. 306 (2003). In *Grutter*, this Court ruled that "whenever the government treats any person unequally because of his or her race, **that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection**."(emphasis added) (internal quotes and citation omitted). In spite of this Court's clear standard for an equal protection claim, the Sixth Circuit (joining the Third, Fifth and D.C. Circuits) has imposed a different and indeed heightened standard, requiring an additional showing of "harassment."

Equally as troubling as these circuits' arbitrarily heightened "harassment" requirement is the lack of any definition of what constitutes "harassment" sufficient to support an equal protection claim. Here, Petitioner set forth facts to establish that the racial tirade to which he was subjected was coupled with *both* a threat of violence *and* a 30-45 minute police detention. Nevertheless, the Sixth Circuit concluded, without any meaningful analysis, that the present case was "not one in which any evidence of harassment existed." (Respondents' Brief at 24). Simply stated, if the facts of this case are insufficient to support the "discriminatory effect" component of an equal protection

claim under these circuits' heightened standard, then it is left to this Court to articulate the applicable standard.[2]

The humiliation that necessarily attends the racial berating that Petitioner suffered as he lawfully addressed his local government is no different in discriminatory effect than the injury suffered by black students in schools that were segregated under the old "separate but equal" doctrine. "Our pointed focus in *Brown I* upon the **stigmatic injury** caused by segregated schools explains our unflagging insistence that formerly *de jure* segregated school districts extinguish all vestiges of school segregation." (emphasis added). *Board of Educ. of Oklahoma City Public Schools, v. Dowell* 498 U.S. 237, 257 (1991). The "stigmatic injury" is no less apparent here where Petitioner has been subjected to a racially hostile philippic in response to his lawful attempt to seek redress from his city council.

CONCLUSION

If the Sixth Circuit's interpretation of First Amendment retaliation protections and the Equal Protection Clause is correct, as Respondent suggests, then every African American who wishes to petition his local government can

[2] Respondent's argument that what constitutes "harassment" should be determined by a jury rings hollow in light of the fact that Petitioner was *denied* the opportunity to present his claims to a jury.

expect to endure retaliatory and racist indignities and even threats of violence for which he will have no constitutional recourse. Absent this Court's review, African Americans – and indeed every person less favored among the majority – will be faced with the untenable choice of exercising his First Amendment right under these circumstances or simply remain silent. This case cries out for the Court's intervention.

For the foregoing reasons and those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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